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SOL (MSHA) V. DAVIS COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	PETITIONER	Civil Penalty Proceedings Docket No. WEVA 80-309 A.C. No. 46-02208-03033R
v.		Docket No. WEVA 80-310 A.C. No. 46-02208-03034
DAVIS COAL COMPANY,	RESPONDENT	Docket No. WEVA 80-311 A.C. No. 46-02208-03035
		Docket No. WEVA 80-325 A.C. No. 46-02208-03036V
		Docket No. WEVA 80-330 A.C. No. 46-02208-03037
		Marie No. 1 Mine

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner Paul E. Pinson, Esq., Williamson, West Virginia, for Respondent

Before: Judge Melick

These cases are before me upon petitions for assessment of civil penalties under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act." A hearing on the merits in the cases docketed as WEVA 80-310 and WEVA 80-325 was held on September 9 and 10, 1980, in Charleston, West Virginia. The parties thereafter agreed to proceed on stipulations of fact as to the cases docketed as WEVA 80-311 and WEVA 80-330 and moved to settle the case docketed as WEVA 80-309. I approved the motion for settlement and accepted the stipulations of fact. I now reaffirm those determinations.

The general issue in these cases is, of course, whether the Davis Coal Company (Davis) has violated the provisions of the Act and its implementing regulations and, if so, what are the appropriate civil penalties to be paid.

In determining the amount of penalty that should be assessed for such violations, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) the effect on the operator's ability to continue in business, (4) whether the operator was negligent, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

A. Contested Cases

Docket Nos. WEVA 80-310 and WEVA 80-325

At the conclusion of the evidentiary hearing as to these cases, I rendered a bench decision which is reproduced below with only non-substantive corrections. I reaffirm that decision at this time.

> I am prepared to rule. With respect to Citation No. 75994 which charges a violation of 30 C.F.R. 75.316, I find that the violation clearly did occur. That particular standard requires, in essence, that a ventilation system and methane and dust-control plan and revisions thereto be filed and approved by the Secretary. That standard has been interpreted by both the Board of Mine Operations Appeals and by various judges in the Federal Mine Safety and Health Review Commission, including myself, to mean that violations of the plan are also violations of this particular standard. The plan here in effect called for the use of a Lee-Norse model 265 continuous miner with 35 regular sprays on the ripper head each operating with 58 pounds per square inch of pressure and a flow rate of 17 gallons per minute.
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> The inspector's testimony I find completely credible and in all essential respects uncontradicted. Inspector Hinchman testified that of the 35 spray nozzles on the cited Lee-Norse continuous miner, 30 were completely clogged when he conducted his regular inspection of the Marie No. 1 Mine, on July 26, 1979, and that of the five remaining nozzles, only a trickle of water was being emanated. His determination of the reason for this defect, while not essential to proving the violation, is nevertheless interesting because it shows that the condition existed for some time. His analysis of the situation showed that the nozzles were in fact clogged with coal dust, that in fact some of the fittings were broken, and that some of the branch hoses leading to the particular nozzles were leaking and thereby decreasing the water and water pressure available to those nozzles.
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> Now, Inspector Hinchman could very well have issued an unwarrantable failure type of citation in this case.

Clearly, based on his testimony, which is uncontradicted, the condition

existed prior to the beginning of this shift. The miner operator was in a position and the mine foreman (Mr. Beasley) was certainly in a position to have observed this condition from at least the beginning of the shift, and that therefore, they certainly should have known of the violative condition. I consider the failure to correct that condition to be gross negligence.

The hazard presented was essentially from the increased dust that would result from the failure of the spray nozzles to function and this dust could not only increase the health hazard of miners working in the area from increased respirable dust, but also increase the amount of float coal dust in the immediate vicinity of the miner and in other areas of the mine. I note also that there had been previous violations relating to float coal dust in this particular mine. The failure to have the spray controls functioning could also increase the methane level and, as the inspector testified, this mine has had methane problems on prior occasions. Although there was no testimony of an ignition source in the immediate vicinity, I find that a hazard from potential fire and explosion was nevertheless present because of the operating equipment and I consider that the dangers that I have described were likely to happen, and could result in serious health problems or injuries. I observe also that there were two persons in the immediate vicinity of the miner and that there were five or six additional people who would have been exposed to these additional hazards.

Now, the defense in this case was essentially that if there was no water coming out of the nozzles, the machine would have burned up as a result of failure in the cooling system. However, this argument presupposes that the water could not have leaked out after passing through the cooling system and the evidence in this case is that in fact the water was leaking out in such other locations, that is, out of the branch hoses. Mr. Davis, himself, testified that the water goes through the cooling system before reaching those branch hoses, so the machine could clearly have been cooled sufficiently and then the water could have leaked out through the branch hoses before reaching the nozzles. So, that defense is not supportable.

Now, with respect to Citation No. 676020, I also find a violation there. The citation, as amended, charges a violation of 30 C.F.R. 77.502. That standard reads as follows: "Electric equipment shall be frequently tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from

service until such condition is corrected. A record of such examination shall be kept." Under 30 C.F.R. 77.502-2, the examination and tests that are required under Section 77.502 must be made at least monthly.

Now clearly, and it is undisputed in this regard, the operator did not have any entry in the appropriate books to reflect that an electrical examination was conducted in the surface facility at the Marie No. 1 Mine after April 22, 1979. The MSHA inspection was conducted on August 6, 1979. The violation, therefore, is proven as charged.

Mr. Hinchman testified that the hazard in this case is that electrical equipment could have been faulty during this interim period and remained undetected and that unsuspecting employees could therefore place themselves in a dangerous position from which they could receive serious injuries from electrical shock. I consider this to be a potentially dangerous and serious hazard. I observe in this regard that on the same date as this citation, serious electrical defects were detected, including bad splices and defective grounding of the frame, in areas where employees would be expected to work on a daily basis. Five employees would have been exposed to these dangerous situations.

Now, I also consider that the operator was negligent with regard to this violation and again an "unwarrantable failure" citation would have been justified in this case. Clearly, the operator should have known that this condition existed. More than 3 months had elapsed since an entry had been in the book which indicates a serious failure on the part of the operator to maintain the books in conformity with the standards.

The defense in this case was essentially that the electrical equipment could have been inspected and probably was, but this is strictly speculation on the part of Mr. Winfred Davis and there is no affirmative evidence that this equipment was in fact examined properly and found to be in a safe operating condition. In fact, from the evidence that there were in fact electrical hazards existing on the date of this inspection, it is apparent that such inspections by the operator were in fact not made or if they were made, they were made in a slipshod or negligent manner. I therefore reject the defense.

The bench decision in Docket No. WEVA 80-325 is as follows with only non-substantive corrections. I reaffirm that decision at this time.

I am prepared to rule. First of all, regarding Order No. 677287, which was a 104(d)(2) order charging a

violation of 30 C.F.R. 759316. Of course, section 75.316 specifically

relates again only to the requirement for the filing and approval of a ventilation system and methane and dust-control plan, but as I said with respect to previous case, that regulation has been interpreted as meaning that the approved plan must also be complied with. The plan in this case that was in effect on the date in question, that is June 11, 1979, called for the use of a continuous miner, the Lee-Norse 265, and called for 35 regular sprays located on the top, bottom, and sides of the ripper head.

Now, Inspector Hinchman testified that upon his arrival at the site where this particular miner was operating, he first of all observed an excessive amount of dust in the air. He then observed that all 35 of these spray nozzles were clogged and were in fact dry. He also observed that there was no water on the ground or around the miner.

Now, the witness presented by the operator, Mr. Mondlak, who certainly is an expert in the operation of this type of machinery, testified that if all the nozzle heads were in fact clogged fully, the machine would most likely shut down in less than 30 minutes. He said 30 minutes was probably the outside limit on this particular machine and that would be because one of the sensors on the three motors would most likely turn the equipment off automatically when it reached a certain temperature due to a lack of cooling water flowing through the system. Mr. Mondlak also testified that the machine could operate, however, with as many as 10 percent of the nozzles plugged up and would not overheat under those circumstances. He also testified that the nozzles might periodically clog and unclog without any outside attention.

This testimony by Mr. Mondlak does not directly contradict the testimony of Inspector Hinchman, except regarding possibly the amount of time that this miner may have been fully or totally clogged. I would tend to accept Mr. Mondlak's testimony to the extent that the miner was probably not operating in this condition for a very long period of time. However, the testimony does not in any way contradict Inspector Hinchman's testimony that the miner was in fact clogged totally at the time he observed it. There is no direct contradictory testimony of that fact and I therefore accept it and therefore, the violation is and has been proven.

Inspector Hinchman also testified that the foreman in this particular section, Mr. Beasley, was present and in a position from which he could have observed the condition of the miner and with the excessive dust in the air, it should have been obvious to Mr. Beasley that something was awry. Mr. Hinchman, by the way, testified that the mine foreman, Mr. Beasley, was

actually within 20 feet of the miner at

this time. Certainly, under those circumstances, I can find that management, through its foreman, Mr. Beasley, should have known that there was a problem with this miner. I therefore find that the operator was negligent in this regard. The fact that the miner may not have been operating in that condition for as long as Mr. Hinchman thought it might have been dilutes somewhat the amount of negligence, but nevertheless, there was negligence here.

The hazard presented was clear. The excessive dust causes a hazard to miners in the respirable dust sense and it also presents a hazard from float coal dust. The inspector testified that there was in fact a possible ignition source from the miner striking rock and causing a spark, thereby causing potentially fatal injuries to as many as three people who would be in that particular area.

In light of the testimony from Mr. Davis, himself, I take the history of methane in this mine to be somewhat less severe than the impression created by Inspector Hinchman. Although there is always the danger of methane being emanated, I consider the hazard from potential explosion or fire to be slightly less than perhaps was presented by the inspector.

Now, with respect to Order No. 677923, which was also a section 104(d)(2) order and was issued on June 12, 1979, for a violation of 30 C.F.R. 75.200. That section requires, in part, that the mine operator file and have an approved roof-control plan in effect. That section also requires, however, that: "The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs."

Now, the order at issue here actually charges two violations. The first part of that order charges a violation of the roof-control plan itself, and the second part of the order, beginning with the last line (Exh. G-11), under the subheading "Condition or Practice," the order states, "and the area experiencing a fault slickenside roof formation (horseback) was inadequately supported."

I do not find that in the first part of that order that a violation has been actually charged and that is because in reading the roof-control plan, under the section cited to me, it requires something totally different than the violation cited in the order itself. The roof-control plan provides on page 9, "(c) torque checks will be made on at least one out of every ten roof bolts from the face to the outby side of the last open crosscut each 24 hours during coal producing days." There is no evidence that that particular

provision has been violated in this case. The plan goes on to state, "[t]he results shall be recorded, showing how many checks were made,

how many roof bolts were below 100 foot pounds when installed against the roof, or 70 foot pounds if installed against wood, and how many roof bolts were above 240 foot pounds." I think Mr. Hinchman conceded that the results were recorded, although he was somewhat suspect of the accuracy of the results. But nevertheless, I find that there is not sufficient proof that this provision has been violated. Then finally, the plan states, "[i]f more than one-half of the tested roof bolts fall outside the listed range, supplementary support," and so forth. But in this case, according to the records of the company which have not been proven to be false or incorrect, the roof bolts did not fall outside the listed range and therefore this provision too is inapplicable.

However, I do find that based on the expert testimony of Mr. Hinchman that the conditions of the roof here clearly did warrant special attention and were in fact not adequately supported. In fact, the foreman, Mr. Beasley admitted and acknowledged that there was a serious problem with that roof. This admission certainly supports the credible testimony of Inspector Hinchman in this regard and I do therefore find a violation in the second part of the order as a result of inadequate roof support. I would vacate, however, the first part of the order and that particular order should be modified to reflect that the first part of that has been vacated. I do not find a violation of the first part of the order. This illustrates the problems in dealing with orders that really cite more than one violation. I think that is not a proper procedure. I think in the future, I think instructions have come down from MSHA headquarters not to follow that practice. Is that correct, Mr. Hinchman?

MR. HINCHMAN: Yes, sir.

JUDGE MELICK: It does cause some confusion sometimes. I have no problem finding that this condition was in fact known to management because Mr. Beasley admitted he knew it existed and that it was a serious problem. Therefore, I find that negligence existed on the part of Davis Coal Company. I also find this to be an extremely hazardous condition. Roof falls are notoriously the primary killers in the mining industry. The fact that Davis has not had any serious casualties due to roof falls is no defense. It is a hazard regardless of the previous history and is a serious hazard.

Order No. 675599 charges a violation of section 77.200 of Title 30, Code of Federal Regulations. The operator has admitted the violation in closing argument and has, of course, presented no contradictory testimony to the fact of the violation nor any defense to it. Clearly, the violation has therefore been proven as charged.

I also find that the operator clearly knew of the condition because Mr. Don Davis told Inspector Hinchman how the accident had actually occurred that caused the large sections of blocks to be broken and in bad repair in the supply storage building. There was a serious hazard presented by the fact that the structure could collapse upon someone in the vicinity of the building and indeed, apparently one worker, the supply man, was periodically in the vicinity of that building.

Order No. 677199 charges another violation of 30 C.F.R. 75.200. Again there is no evidence to directly contradict the testimony of Inspector Hinchman. It is not denied that the entries were of excessive width in the locations cited in the order. There is, therefore, no question that this was a violation of the roof-control plan which specifically and precisely sets the width limit on the entries to be 20 feet, and in particular, I am referring to page 5 of the roof-control plan, in evidence as Exhibit No. 12.

Now, it is clear that management was aware of this condition in light of the fact that the foreman admitted to Mr. Hinchman that, "I'm not through with it," in referring to the fact that he started to place crib blocks in the affected areas to alleviate the problem. However, there were not sufficient crib blocks in place when the violation was found and indeed, there was no work then being done to provide sufficient crib blocks. In addition, men were continuing to mine in this particular area where the roof, according to Inspector Hinchman, was in fact starting to break up due to the excess width. This is not contradicted. Indeed, the seriousness of the hazard was underlined by the testimony of Hinchman that the roof was actually spalling around the bolts and the plates, showing signs of excessive pressure on the plates. He also observed cracks in the roof.

Order No. 675993 also charges a violation of 30 C.F.R. 75.200. Now again, this violation is proven as charged. There is no defense presented to this other than the allegation that torque wrenches were available on the surface. The fact is, however, that the torque wrench was not provided, as required in the roof-control plan, on the roof-bolting machine. In particular, on page 8 of that plan, item 12(a) requires that "an approved calibrated torque wrench, maintained in workable condition, shall be kept on each roof bolting machine in use."

There is also evidence that this particular roof-bolting machine was being used. The machine operator told Inspector Hinchman that he then had no torque wrench and had none the day before. Foreman Beasley had to call outside to get a torque wrench.

There was none in the vicinity of the machine or even inside the mine.

As pointed out by Inspector Hinchman, the fact that no torque wrench was available is serious because there is no other way to check the torque on the roof bolts without using such a tool. Of course, proper roof bolting is essential to a sound and safe roof condition. So, I consider the violation to have been serious. The fact that the machine operator had not had a torque wrench for at least 2 days does suggest a high degree of negligence.

The fact that the operator had many torque wrenches on the surface is no defense to this. Those are useless on the surface. They must be located where they can be used.

All right, moving on then to Order No. 676006, again charging a violation of the roof-control plan and in particular, a violation of the provisions requiring entries not be more than 20 feet in width. It charges that the roof bolts were 7-1/2 feet from the rib on the left side of the No. 3 entry, over a distance of 15 feet. Actually, there are a number of charges in this particular order. Again, there is no defense presented to the testimony of Mr. Hinchman that the entries were in fact wider than 20 feet, in excess of that mandated width as provided on page 5 of the roof-control plan, and therefore, that violation is proven as charged. Moreover, there has been no defense presented to the fact that the roof bolts were placed more than 4 or 5 feet from the rib on the left side of the No. 3 entry. Clearly, in either case, whether it was required to be 4 feet or 5 feet at that point, it was in violation since they were 7-1/2 feet from the ribs. There has been no defense proffered to that violation either so that that, too, has been proven as charged.

I find also that the operator was negligent in this case because Mr. Beasley admitted that he had in fact ordered the entry to be widened to allow the conveyor to be placed in a straight line. It was also a hazardous condition. The mine was in operation. Coal was being mined and the conveyor was operating.

A defense has been offered that the cribs were partially stacked, that is, two cribs were partially stacked, but there is no evidence to indicate that work was continuing on the cribs and according to Mr. Hinchman, even had those two cribs been completed, they would have been insufficient to support the roof as bad as it was. The hazard was indeed increased in this location because of the nature of the roof there. It consisted of broken slickensided slate and it was a particularly bad roof according to Inspector Hinchman. There is no evidence to contradict that testimony.

All right, moving along to Order No. 676008. That charges a violation of 30 C.F.R. 75.512. That standard requires that:

> All electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept and made available to an authorized representative of the Secretary and to miners in such mine.

Now, the order at issue here charges that, "[t]he Number 3 shuttle car operating in the 014 section, serial number L569772 FMC, was not maintained in a safe condition for operation. The shuttle car did not have brakes and the light system was partially inoperative and was being operated under these conditions." The essence of this violation is in fact that this particular shuttle car was not properly maintained. This particular provision does appear in the first part of the cited standard. The evidence is uncontradicted that the shuttle car did not have proper brakes and did not have proper lights.

The testimony of Inspector Hinchman was that the lights on this shuttle car were only providing 2 or 3 feet of illumination even though he could see the lights from as far away as 50 feet. The machine also, according to Mr. Hinchman, was essentially operating in an uncontrolled manner and that it could be stopped only by bumping against a mound of coal or such similar obstacle. Both of these conditions indeed could have and did expose at least two people to injuries of a serious nature.

I am also going to consider the testimony of the machine operator in this case, that he had told the chief electrician, Larry Davis, the day before this order was issued that indeed the shuttle car did not have brakes or lights, and therefore, I am finding that the operator was indeed negligent with respect to this order also.

Now, with respect to Order No. 676014, again, there is no denial of the offense charged. The cited standard, 30 C.F.R. 77.701, requires the "grounding of metallic frames, casings, and other enclosures of electrical equipment receiving power from a direct current power system."

Now, I consider, however, that the gravity of the violation is attenuated by the testimony from Mr. Davis

that the pump was located some 75 feet from the preparation plant and that really, the exposure would have been, at most, to one

person who would go to the pump and service it, certainly not every day, but over some extended period of time. The switch that controlled the pump was located not only on the pump, but in the preparation plant itself and was in fact operated from the preparation plant, thus limiting the exposure to that particular hazard. The hazard was nevertheless present to that one employee when he would be in the vicinity of the particular pump, and indeed, the hazard was aggravated by the fact that it was a wet environment, that the splices themselves were improper and that there was no rubber insulating mat provided, as required apparently by some other regulation.

B. Uncontested Cases

Docket Nos. WEVA 80-311 and WEVA 80-330

The following stipulations were proffered by MSHA at hearing and accepted by the operator. I adopted those factual stipulations at hearing as my findings of fact.

MS. ROONEY (MSHA counsel): In regard to WEVA 80-311, the parties have agreed to stipulate the following testimony with reference to each of the five citations.

With reference to Citation No. 677216, issued on May 10, 1979, a 104(a) citation for a violation of 30 C.F.R. 75.512, the condition or practice stated is that, "[t]he Number two shuttle car and S and S coal scoop charger in the 14 section were not examined often enough to assure a safe operating condition and were being used as electrical equipment in this working section."

Termination due date upon that citation was May 11, 1979, at 8 o'clock.

If the inspector were to testify, his testimony would be that the operator should have known about the violation and this type of violation occurs frequently at this mine. The gravity of the violation was such that it was probable that the occurrence of the event which the cited standard is directed--the injury resulting from or contemplated by the occurrence of the event could reasonably be expected to be permanently disabling. The number of persons who would be affected if the event were to occur would be one person at the charging station.

Conditions or circumstances which might have increased the likelihood or the severity of the event were that there were mud and water and improperly spliced cable in the area. The operator did terminate the violation within the time specified for abatement.

With reference to Citation No. 0676822, issued on August 9, 1979, a 104(a) citation, part and section violated was 30 C.F.R. 77.400. The condition or practice cited was, "[t]he metal dodge line shaft coupling for the washer located on the second floor of the preparation plant was not guarded and the exposed moving parts could be contacted by persons, causing an injury."

The termination due date was set for August 10, 1979, at 8 o'clock.

If the inspector were to testify, he would testify that the operator should have known about the violation in that it was visible to anyone entering the tipple. The gravity of the violation was such that it was probable that the occurrence of an event against which the cited standard was directed could occur.

The injury resulting from or contemplated by the occurrence of the event could reasonably be expected to be permanently disabling. The number of persons who would be affected if the event were to occur would be one person at the prep plan.

The operator also terminated this violation within the time specified for abatement.

With reference to Citation No. 676823, issued on August 9, 1979, a 104(a) citation, the part and section violated is 30 C.F.R. 77.205. The condition or practice set forth is that, "[t]he wooden flooring located on the second floor of the preparation plant near the wash box and where men were traveling was badly deteriorated and a section of the flooring missing, creating a hazard to persons required to travel in this area."

The termination due date was set at August 17, 1979, at 8 o'clock.

The inspector would testify that the operator should have known about this violation. It could easily be detected and was quite visible to all persons. The gravity of the violation was such that it was probable that an occurrence of the event against which the cited standard is --

JUDGE MELICK: What was the event that was concerned about in this?

MS. ROONEY: What was the --

JUDGE MELICK: What was the specific hazard that you are talking about?

MS. ROONEY: Oh. A fall of a person through a deteriorating floor.

JUDGE MELICK: Oh, all right.

Go ahead.

MS. ROONEY: The occurrence of the event, i.e., the fall of a person through a deteriorating floor, was probable. The injury resulting from or contemplated by the occurrence of such an event would be permanently disabling. The number of persons who would be affected would be one and that person would be at the surface prep plant.

The operator, here, terminated the violation within the time specified for abatement.

MS. ROONEY: With reference to Citation No. 676824, a 104(a) citation, the part and section cited were 30 C.F.R. 77.505. The condition or practice set forth is that, "[t]he power cable for the wet coal elevator motor switch box was not entered through proper fittings and located on the third floor of the preparation plant. No fittings were provided. Insulated wires passed through the energized metal box."

A termination due date was set for August 10, 1979, at 8 o'clock.

If the inspector were to testify, he would state that the operator should have known about this violation. It could easily be detected by the certified persons present. The gravity of this violation was such that it was probable that electrical shock could occur. The injury resulting from or contemplated by the occurrence of the event could reasonably be expected to be permanently disabling.

The number of persons who would be affected if the event occurred would be one person at the preparation plant.

The operator abated this violation within the time specified for abatement.

With reference to WEVA 80-330, the parties stipulate that the testimony on this 104(d)(2) order would be as follows:

Order No. 676007, issued on July 30, 1979, the part and section violated is 30 C.F.R. 75.303. The type of action is a 104(d)(2). The condition or practice cited is that, "[t]he results of the pre-shift examination for the day shift on July 30, 1979, was inadequate in

that the hazardous roof control practices were not recorded in the book provided for that purpose by the certified person."

The initial action for this 104(d) order was--occurred on January 3, 1979, and that was 104(d) Order No. 024472.

If the inspector were to testify, he would testify that the operator knew about this violation. The preshift examiner should have found the conditions obvious and located on the last open crosscut, and this should have been recorded within the book.

The gravity of the violation was probable in that a failure to record hazards could result in persons who are authorized or miners who are authorized to check these books--would be able to find out where and what these hazards were.

The injury resulting from or contemplated by the occurrence of such an event could reasonably be expected to be permanently disabling. The number of persons who could be affected if the event were to occur would be eight at the working section.

The operator terminated the condition by a new preshift examination which was made and recorded. The hazards in the 014 working section were recorded and that was done on July 30, 1979, at 1400, which is 2 p.m.

C. Settled Case

Docket No. WEVA 80-309

At hearing, the parties moved for approval of a settlement of the one citation in this case requesting a penalty of $200. The citation (No. 023297) was issued for a violation of section 103(a) of the Act in that the operator directed the MSHA inspector to leave the area of his preparation plant thereby preventing him from conducting his inspection. There had been no history for the preceding 5 years of any type of threats or violence toward any authorized representative of the Secretary and there had been no history of this specific type of violation. I consider the evidence submitted in light of the criteria under section 110(i) of the Act and I find that the proposed assessment is appropriate.

D. Additional Findings as to Penalty Criteria

(1) Size of Business

The parties have stipulated in all cases that the annual production for Davis and its Marie No. 1 Mine is under 50,000 tons thereby placing it in a small-size category.

(2) Good Faith Abatement

The parties have further stipulated that the operator exercised good faith in attempting to achieve rapid compliance after notification of the violations in the citations and orders

before me.

(3) History of Violations and Ability to Continue in Business

I rendered a bench decision at hearing in which I made specific findings applicable to all cases before me regarding these criteria. Those specific findings are set forth below with non-substantive corrections and reaffirmed at this time:

> One of the two criteria that remains for consideration at this time is the operator's prior history of violations and as I stated before, I find that history not to be very good. In fact, it is quite bad. There had appeared to be a very lax attitude by Davis toward safety, a rather sloppy attitude, and I therefore cannot consider any significant penalty reductions in this case. In light of the testimony of Inspector Hinchman about an improved recent history, however, I will consider some reduction.
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> Now, the operator has also placed great emphasis in this case on his financial condition and he claims that even the penalties that were proposed by the Mine Safety and Health Administration would adversely affect his ability to continue in business. Of course, we heard extensive testimony from his accountant, Donald Wright, but I do observe that even that accountant could say no more than that the proposed assessments could affect Davis' ability to stay in business. That is as far as he would permit himself to go. I also observe that in spite of these alleged financial difficulties that Davis claims to have had for a number of years, he has managed to stay in business and indeed, has even seen fit to vote he and his wife salary increases, giving them a combined salary in a recent year of more than $67,000. I also observe that Davis Coal Company has been able to continue to get financial assistance from institutions that are usually quite critical when loaning money, namely, banks. So, I am not all that convinced that the dire financial condition that was proffered by the accountant is in actuality all that bad. Of course, the statements that were utilized by the accountant were not audited or certified statements. The credibility of those statements is accordingly affected.
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> I also observe that, although these are not liquid assets, that Davis does retain valuable coal leases over large coal reserves, both in its own and its subsidiary's control and that these properties or this right was not considered by the accountant and it is not considered in accounting practice, apparently, to be an asset. I also observe that the valuation placed on the various Davis Coal Company properties by the accountant was based on a depreciated value as determined by the ordinary practices of accountants in compliance with Internal Revenue Service guidelines and rules. But that does not always, of course, reflect

the true market value of such property. I just point out by way of illustration that the

Rolls Royce that was purchased for over $43,000 by the Davis Coal Company in late 1977 had a book value placed on it of only $27,000. But I would hazard to guess that that vehicle is probably now worth substantially more than its original purchase price. I am just using that as an illustration that the accounting procedures or the accounting practices are not always truly reflective of market value.

In any event because of these factors I have just discussed, I do not give great weight to the accountant's figures or to the claims of poverty. Indeed, it might be in this case appropriate that because of the past history of Mr. Davis' company, that he sacrifice some of his rather substantial salary to pay some of these penalties. I do, however, consider that there has been sufficient evidence of financial difficulty that I am going to grant reductions in the penalties amounting to approximately 25 percent overall %y(3)5C.

ORDER

Upon consideration of the entire record and the foregoing findings and conclusions and in light of the criteria set forth in section 110(i) of the Act, I hereby ORDER that the following penalties totaling $9,030 be paid within 1 year of the date of this decision, payment to commence within 30 days of this decision and to be made in equal monthly installments over that period of time.

	Citation/Order No.	Penalty
I.	Docket No. WEVA 80-309	
	23297	$ 200
II.	Docket No. WEVA 80-310	
	675994	$ 180
	676020	110
III.	Docket No. WEVA 80-311	
	677216	$ 110
	676822	180
	676823	180
	676824	120
	676825	110

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IV. Docket No. WEVA 80-325

677287	$ 400
677293	800
675599	1,200
677199	1,200
675993	1,200
676006	1,200
676008	1,200
676014	500

V. Docket No. WEVA 80-330

676007	140

Gary Melick
Administrative Law Judge